Supreme Court, U.S.
FILED
JAN 4 1994
OFFICE OF THE CLERK

93-1082

No. 93-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN A. MORRISON, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

QUESTION PRESENTED

Under the federal discovery rule, can a single injury have more than one legal cause, with each cause giving rise to a separate claim for relief which may accrue for limitations purposes at different times?

LIST OF PARTIES

Petitioners, plaintiffs-appellees, below:

John A. Morrison, Robert G. Jacobsen, Donald F. Hill, George H. Liveris, Robert A. Irwin, A.D. Bond and Ira S. Reavis, for themselves and on behalf of others similarly situated, as part of a class certified by the District Court under Fed. R. Civ. P. 23.

Respondent, defendant-appellant, below:

Mobil Oil Corporation.

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MOBIL OIL CORPORATION,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners, plaintiffs below, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion, denominated *Raymond v. Mobil Oil Corp.*, is reported at 7 F.3d 184 (1993) (*Raymond II*) and is reprinted in the appendix at 1a-5a.

RELATED CASES

Raymond v. Mobil Oil Corp., 983 F.2d 1528 (10th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 81, 126 L.Ed.2d 49 (1993) (*Raymond I*).

Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992).

Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir.), *cert. denied*, 498 U.S. 898, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

JURISDICTION

The Tenth Circuit's judgment in this case entered on October 6, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This petition involves the Age Discrimination in Employment Act ("ADEA"). The ADEA makes it unlawful for an employer to:

> . . . discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1). The ADEA statute of limitations provides for a three-year period for a civil action alleging a willful violation of ADEA. 29 U.S.C. §§ 255(a), 626(e)(1).

STATEMENT OF THE CASE

A. Factual Background of Mobil's Fraudulent Concealments.

The alleged fraudulent and age-discriminatory concealments by Mobil Oil Corporation ("Mobil") took place in 1984 when all plaintiffs were Mobil employees who were at least 55 years of age and members of the ADEA protected class.

1. *The Origins of Mobil's Strategy to Induce Age-Discriminatory Early Retirements.*

As part of their compensation, the plaintiffs earned pension benefits under an ERISA-governed pension plan ("plan"). Before July 1984, the plan allowed a retiring employee to take his or her pension either in the form of

a monthly annuity, or in a lump sum if the employee's accrued pension totalled $250,000 or if the employee's net worth, exclusive of the pension, exceeded $250,000 (the pre-1984 eligibility threshold).

Plaintiffs allege that in late 1983 Mobil first considered an increase in the eligibility threshold to induce age-discriminatory retirements. In October 1983, Mobil was advised by its attorneys that the IRS probably would not approve an increase in the eligibility threshold because the change would constitute an "impermissible preference" in favor of highly compensated employees.

By December 1983, Mobil executives were aware that a change in access to the lump sum pension benefit would induce employee retirements. In a report to the Executive Committee, Mobil's employee benefits department noted that the threat of an increase in the lump sum eligibility threshold would "accelerate early retirements" because the lump sum was approximately 40% more valuable than the alternative monthly annuity. In a supplemental report, Mobil's benefits department urged the Executive Committee to adopt a "transition plan to control accelerated retirements." What Mobil's benefits department perceived as a problem, however, Mobil's Executive Committee considered an opportunity.

2. ***Mobil's "Early Retirement" Strategy.***

Simultaneous with the benefits department's warnings about accelerated early retirements, Mobil retained Donald Alexander, former commissioner of the IRS, as its special counsel for advice as to how Mobil might raise the lump sum eligibility threshold notwithsatnding the IRS's position on "impermissible preferences" for executives. Alexander's inquiries to the IRS National Office yielded the expected response:

> [O]n an amendment increasing the lump sum hurdle rate, the probable response would not only be disapproval of any increase, but an insistence on the

> removal of the existing threshold as well. A restrictive lump sum provision, in short, is "sown with the seeds of discrimination."

Undaunted, Mobil's Executive Committee assigned company actuaries to forecast the effects of increasing the lump sum eligibility threshold from $250,000 to $450,000 and delaying the effective date of the change for six months, thus creating a "window" under which employees over the age of 55 could take the lump sum benefit under the $250,000 threshold so long as they retired within the six-month window period. Eligible employees over age 55 who chose not to exit through this window with their lump sum pension risked losing the lump sum benefit under the higher threshold. Plaintiffs were thus presented with a Hobson's choice: relinquish their jobs to preserve their lump sum or retain their employment but lose their lump sum.

Mobil's actuaries estimated that "over 1300 [employees] . . . would be subjected to substantial pressure to retire" in order not to lose the lump sum pension benefit before the window closed. In April 1984, an outside actuarial consultant prepared an extensive analysis of the proposed plan amendment. The analysis explicitly recognized that what Mobil's executives were now calling their "lump sum strategy" was, in reality, not a truly voluntary early retirement program.

3. *Mobil's July 1984 Communication to Employees Announcing an Increase in the Eligibility Threshold.*

In May 1984, Mobil executives were alerted to a new problem: the IRS's opposition to benefit "cutbacks" (even cutbacks to "optional" benefits) might become law. Mobil's employee relations departments realized that the pending legislation, eventually the Retirement Equity Act of 1984 ("REA"), would "grandfather" the $250,000 eligibility threshold. A committee of employee relations managers recommended that Mobil's executives "delay

[the] effective date [of the change in the eligibility threshold] to six months *after* IRS approves" the change, and that if the IRS does not approve the change, the "employee should be so informed."

Those recommendations notwithstanding, Mobil's Executive Committee met on June 13, 1984, before the REA became effective, and formally adopted the increase to the eligibility threshold and the window period to induce the desired "early retirements." Mobil then announced the proposed amendment and the window period to its employees, including the plaintiffs, on July 2, 1984.

In describing the threshold increase and the window period to the employees, Mobil carefully cultivated the impression that the amendment was lawful in all respects. Mobil made it clear that it had the right to amend the plan, subject to IRS approval, and that it could have amended the plan and announced the threshold increase without any window period. It also told the employees that the plan amendment was necessitated by "cost-savings" and "intervening inflation," as well as by "competitive practices" and "plan needs." Although many Mobil employees voiced their displeasure over the choice imposed by the announcement, virtually all believed that the change was legal and permissible.

It is important to note at this juncture that the essence of plaintiffs' claims lies not in the substance of the plan amendment, but in what Mobil concealed from plaintiffs about the amendment *after* the proposal was announced.

4. *Mobil's Fraudulent and Age-Discriminatory Concealments During the Window Period.*

In July 1984, two weeks after Mobil communicated the threshold increase and the window period to plaintiffs, Mobil's tax counsel submitted an "Application for Determination" letter to the IRS. Two months later, in September, the IRS agent who reviewed Mobil's lump sum amendment informed Mobil that "the $450,000 threshold

. . . would discriminate in favor of members of the prohibited group, the 'highly paid executives.' " The IRS agent declined to approve the $450,000 standard and urged referring the matter to the National Office.

Mobil did not disclose to plaintiffs that the July plan amendment, described as "routine" just three months earlier, had not been approved by the IRS. Instead, in October 1984, Mobil quietly revised the July amendment, adding the following proviso:

> The company, in its sole discretion, may waive this condition [the new $450,000 threshold] in individual cases for valid cause shown, under the claim and appeal procedures of the Plan.

In effect, applying for a waiver of the higher eligibility threshold constituted a third option for affected employees —continued employment with lump sum rights rather than early retirement. Notwithstanding the "sole discretion" language in the waiver clause, Mobil knew that waivers of the $450,000 threshold would have to be granted in sufficient numbers to insure that equal proportions of lower-paid employees and "highly paid executives" qualified for the lump sum benefit. Since virtually all Mobil's executives qualified for the lump sum benefit under the $450,000 test, Mobil knew that virtually all applications for waivers would have to be granted. For many plaintiffs, the mere possibility of a waiver would have tipped the balance in favor of keeping their jobs and not retiring prematurely.

The revised plan amendments were informally approved by the IRS in October 1984 and formally approved in November 1984. Mobil, however, concealed the waiver provision to the plan amendment from plaintiffs, who otherwise were preparing to make the Hobson's choice whether to retire during the window period. Mobil also concealed the fact that it would have to grant virtually all applications for waivers under the IRS-approved plan

amendment. In addition, Mobil concealed the fact that the amendment it did adopt was not actually "made" until September 1984, after the effective date of the REA, which meant that plaintiffs' rights to the lump sum benefit under the $250,000 threshold had been effectively "grandfathered."

In October 1984, Mobil prepared two memoranda on the same day concerning the IRS's approval of the modified amendment. The first memo, distributed to Mobil's Executive Committee, fully described the plan amendment with the waiver provision. The second memo, addressed to Mobil's employee relations managers throughout the country, made no mention of the waiver provision.

On December 14, 1984, Mobil's Executive Committee formally adopted the revised plan amendment. On December 21, 1984, Mobil notified its employees that the plan amendment announced in July had been approved by the IRS and would take effect as scheduled on February 1, 1985. This December communication implied that the IRS had approved the amendments in the form announced in July and made no mention of the waiver option which the IRS had required.

On January 1, 1985, more than 1,000 Mobil employees retired under the window program, on the average more than seven years before their normal retirement age of 65. All forfeited their highest earning years and their employment benefits, including the accrual of additional retirement benefits.

Mobil did not announce the existence of the waiver provision to any of its employees, other than top-level control group executives, before October 29, 1985—more than ten months after plaintiffs and other employees retired. Even then, Mobil did not disclose the fact that the waiver provision had been adopted during the six-month window period in 1984. Mobil's concealments were not discovered until 1988 as a result of discovery

in a related case. *See Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990).

B. Related Cases.

1. *The Mitchell Case.*

Mitchell filed his lawsuit in 1986, asserting that the plan amendment announced in July 1984 put him to an age-discriminatory choice either to keep his job and lose the lump sum benefit or to forsake his job to take the lump sum benefit. Thus, Mitchell's suit was within the ADEA limitations period triggered by the Hobson's choice which effected his constructive discharge. Mitchell also asserted claims under ERISA and state law.

In 1988, Mitchell's counsel discovered the existence and terms of the waiver option, previously concealed, and thus discovered that "early retirement" was not the only option by which Mitchell and similarly situated employees could have preserved their rights to the lump sum benefit. Although Mitchell introduced evidence of the newly discovered concealments at trial, he did not assert a separate claim predicated on those concealments; rather, he proceeded at trial on an age-discriminatory "constructive" discharge theory only.

Mitchell prevailed at trial, a seven-person jury finding a willful violation of ADEA by Mobil. On appeal, the Tenth Circuit concluded that Mitchell "did establish, as a matter of law, that he had been constructively discharged because of his age," 896 F.2d at 468, but ruled that Mitchell failed to "meet his burden of production on the issue of pretext" and therefore reversed the district court's denial of Mobil's motion for directed verdict. *Mitchell*, 896 F.2d at 473. The Tenth Circuit's opinion in *Mitchell* made no mention of the waiver provision. *See Raymond I*, 983 F.2d at 1530 n.2.

The significance of the Tenth Circuit's "business justification" analysis and its holding that Mitchell failed to show "pretext" cannot be minimized. It means that putting older employees to a Hobson's choice which constitutes a constructive injury does not, without more, violate ADEA. That rule, however, cannot apply to a claim predicated on fraud since there can be no "business justification" for fraudulent concealments and therefore no requirement that the defrauded employee show "pretext."

2. *The Christopher and Falcon Cases.*

In 1989, approximately 70 window retirees filed charges with the Equal Employment Opportunity Commission ("EEOC") and civil actions in federal court for the Eastern District of Texas. *See Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992); *Falcon v. Mobil Oil Corp.*, Civil Action No. B-89-654-CA (E.D. Tex.). The *Christopher* complaint asserted ERISA and state law claims and a single ADEA claim predicated on a "constructive" discharge theory.

In *Christopher*, Mobil moved for summary judgment on the ADEA claim in the district court, primarily on statute of limitations grounds. The district court in *Christopher* granted summary judgment on the ADEA claim, holding that it was time-barred. The *Christopher* plaintiffs appealed, and the proceedings in *Falcon* were stayed pending the outcome of the *Christopher* appeal.

As to the ADEA claim, the Fifth Circuit affirmed, holding that the plaintiffs had asserted but one ADEA claim, on a "constructive" discharge theory, and that allegations of fraudulent concealment were "superfluous" to that claim. *Christopher*, 950 F.2d at 1214-15. The "coercive choice" put to the plaintiffs by the proposed increase in the eligibility threshold was sufficient for a *prima facie* case of "constructive" discharge, thereby commencing the limitations period under ADEA when the Hob-

son's choice was first announced in July 1984. The Fifth Circuit did not address whether the plaintiffs could have stated a separate and distinct claim for a violation of ADEA predicated not on the Hobson's choice imposed by the announced July 1984 plan amendment, but rather on the concealments of the employment choice which should have been made available under the *revised* amendment made in the fall of 1984.

C. Proceedings Below.

In December 1988, soon after discovery during the *Mitchell* case of Mobil's 1984 concealments, plaintiffs filed this action. In January 1989, the plaintiffs filed two class-wide charges of age discrimination with the EEOC. The EEOC charges and the complaint asserted both a constructive discharge theory as in *Mitchell* and a separate fraudulent discharge theory.

In their Third Amended Complaint, plaintiffs dropped the "constructive" discharge ADEA claim based on the coercive choice, accepting the reasoning of the *Christopher* Court that that claim was time-barred. But plaintiffs restated their original fraud-based ADEA claim as two separate claims: one based on the fraudulent concealment of the waiver provision by which the plaintiffs could have chosen continued employment without forfeiting the lump sum benefit, and the other based on the concealment of facts from which the plaintiffs would have learned that their rights to the lump sum benefit under the $250,000 threshold had been "grandfathered" in by the REA.

In response, Mobil moved for summary judgment. Mobil argued that the district court should apply the *Christopher* limitations analysis even to claims for "fraudulent" discharge under ADEA. After briefing and argument which focused on the *Christopher* analysis, the district court held that there could be separate causes of

action for constructive discharge and for fraudulent discharge, with separate limitations periods, under ADEA. The Tenth Circuit reversed, adopting "the reasoning of the Fifth Circuit and hold[ing] as a matter of law that plaintiffs' 'fraudulent discharge' claim is barred by the ADEA statute of limitations." *Raymond II*, 7 F.3d at 186.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's opinion in this case presents an opportunity for this Court to settle a significant question under the federal discovery rule: when a claim is made for injury occasioned by fraud, does the limitations period commence upon awareness of an injury alone, or rather, upon the diligent discovery of the fraud that caused the injury? Does the limitations period on a claim for constructive injury to a federal right bar a claim of fraudulent injury to that same right, or may the fraud claim give rise to a separate limitations analysis keyed to the plaintiff's diligent discovery of the defendant's fraud?

In the particular context of this case, the question is: for purposes of the statute of limitations, is there a difference between a "constructive" discharge and a "fraudulent" discharge? The Tenth Circuit held that the difference was purely "semantic." *Raymond II*, 7 F.3d at 186. For the following reasons, petitioners beg this Court to differ:

1. In an ordinary employment discrimination case, the limitations period commences on the date when the employer's discriminatory act was done or discriminatory decision made. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The "proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (explaining *Delaware State*). Under the federal discovery rule, however, the focus is on the time when the plaintiff knew or reasonably should

have known of the discriminatory or otherwise wrongful act. The plaintiffs here allege that the fraudulent concealment of the waiver provision and the concealment of the grandfathering effect of the REA were discriminatory acts, which the record below establishes and which the Circuit Court had to assume as true, not discovered or reasonably discoverable until 1988. The complaint was promptly filed in early 1989.

2. In *Holmberg v. Armbrecht,* 327 U.S. 392 (1946) it was observed that:

> [This Court] long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is discovered though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." . . . *This equitable doctrine is read into every federal statute of limitation.*

327 U.S. at 397 (citation omitted) (emphasis added). Whether by recognizing a separate claim for fraudulent injury under ADEA or by applying the doctrines of equitable tolling, appropriate here given that Mobil's conduct rose to the level of active deception, this Court should not allow the Tenth Circuit's limitations analysis, applicable to constructive injury, to defeat the federal discovery rule and thus preclude a remedy for fraudulent injury.

3. "Constructive" discharge and "fraudulent" discharge are different claims, factually and legally. As the *Mitchell* case exemplifies, a constructive discharge claim under the ADEA could fail given an adequate showing of a business justification by the employer. But an employment discrimination claim predicated on a fraud targeted only on older workers could not fail for that reason. Fraud can never be "business justified." If the elements and out-

comes of the two claims differ, how can the distinction between them be merely "semantic"?

4. Evidence of an employer's fraudulent concealment does not merely constitute "more evidence" to support a constructive discharge claim. Indeed, fraudulent concealment of information is inconsistent with, and cannot cause, constructive injury. In *Christopher,* the Fifth Circuit held that "[a] 'discharge' within the meaning of [29 U.S.C. § 623(a)(1)] may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances." 950 F.2d at 1214. By definition, concealments, in and of themselves, cannot constitute a circumstance which would compel a reasonable employee to resign. An employee cannot feel compelled or coerced by what he does not know. Evidence of fraud destroys the "constructiveness" of the injury because of such evidence shows that the employee did not "feel compelled" to resign but in fact was tricked into resigning. This is the theory of fraudulent discharge argued by the plaintiffs to the Tenth Circuit, but not presented to the Fifth Circuit. *See Christopher,* 950 F.2d at 1215 (observing that plaintiffs "offered no theory under which the alleged nondisclosure is a necessary element").

5. Carried to its logical extreme, the Tenth Circuit's reasoning in *Raymond II* and the Fifth Circuit's reasoning in *Christopher* would mean that any decision by an employer that is considered adverse by older employees triggers the running of the ADEA statute of limitations as to any and all claims. This would be true even as to an age-discriminatory decision to conceal information, but for which concealment another unconcealed discriminatory decision would not have caused injury at all—*i.e.,* the plaintiffs' involuntary retirements. How can the limitations period for a first cause of action—constructive discharge—absorb the limitations period for a second cause of action—for fraud—when but for that fraud, there could not have been a first cause of action?

6. The subjective impression of age discrimination created by a Hobson's choice should not preclude a separate claim for age-discriminatory fraud. A contrary rule encourages (indeed, compels) the assertion of even the most dubious claims to prevent statutes of limitations from running against claims based on the mere speculation that an as-yet-undiscovered fraud may have played a role in the employment decision. This goes to the heart of the federal discovery rule.

7. While plaintiffs here could have earlier brought constructive discharge claims based solely on the Hobson's choice put to them by the July 1984 plan amendment, plaintiffs also could have reasonably considered that this coercive choice was not the basis for a viable claim under ADEA. Plaintiffs were led to believe, and did reasonably believe, that the July amendment was legal and permissible under ERISA. When an employer represents that its reasons for an announced pension plan amendment are not only not prohibited but are affirmatively permitted by law, a plaintiff who is unaware of discriminatory concealment may reasonably believe that he has no cause of action under *any* law. In this Court's recent opinion in *Hazen Paper Co. v. Biggens,* 507 U.S. ——, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993), the Court would:

> . . . not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that ADEA makes the two factors equivalent, . . . but in the sense that the employer may suppose a correlation between the two factors and act accordingly.

123 L.Ed.2d at 348. In cases alleging not only age-discriminatory fraud, but age-discriminatory fraud which exploits another statute (ERISA) as a shield, the statute of limitations applicable to the ADEA claim should commence when the fraud that is age-discriminatory is discovered or should have been discovered.

CONCLUSION

For the foregoing reasons, plaintiffs pray this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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January 4, 1994

APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit, October 6, 1993

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 93-1159

FREDERIC RAYMOND; J.A. MORRISON; ROBERT G. JACOBSEN; DONALD F. HILL; GEORGE LIVERIS; ROBERT IRWIN; A.D. BOND; VIRGINIA HOWARD; IRA S. REAVIS; BILLY RHEA SARGEANT, for themselves and on behalf of others similarly situated, and others as opt in or consent plaintiffs pursuant to applicable federal law,

Plaintiffs-Appellees,

v.

MOBIL OIL CORPORATION,

Defendant-Appellant.

Oct. 6, 1993

Michael E. Tigar (John G. Koeltl and Mary Ann Doyle, of Debevoise & Plimpton, New York City, and Harold A. Haddon, of Haddon, Morgan & Foreman, P.C., Denver, CO, with him on the briefs), Austin, TX, for defendant-appellant.

Rodney R. Patula (Ricardo M. Barrera, of Pryor, Carney & Johnson, P.C., with him on the brief), of Pryor,

Carney & Johnson, P.C., Englewood, CO, for plaintiffs-appellees.

Before TACHA and SETH, Circuit Judges, and BRIGHT*, Senior Circuit Judge.

TACHA, Circuit Judge.

Mobil Oil Corporation appeals under 28 U.S.C. § 1292 (b) from an interlocutory order of the district court denying its motion for summary judgment on plaintiffs' claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. We reverse.

I. Background

This is an opt-in ADEA class action brought by former Mobil employees who retired under the same Mobil Retirement Plan amendments at issue in Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir.), cert. denied, 498 U.S. 898. 111 S.Ct. 252, 112 L.Ed.2d 210 (1990), Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir.), cert. denied, —— U.S. ——, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992), and the previous appeal in this case, Raymond v. Mobil Oil Corp., 983 F.2d 1528 (10th Cir. 1993). Because these other cases set forth the essential undisputed facts of this case, we do not repeat them here. Certain additional facts, however, are relevant to this appeal.

The plaintiffs filed this action in December 1988, asserting that they were "constructively discharged" in violation of the ADEA because of Mobil's retirement plan amendments and related nondisclosures.[1] The essence of

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* The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

[1] The plaintiffs also brought claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. We have ruled previously on these claims. See Raymond, 983 F.2d at 1529 (holding that plaintiffs lacked standing to sue under ERISA).

the "constructive discharge" claim is as follows: The July 1984 amendment of the "lump-sum option" under Mobil's retirement plan presented Mobil employees over the age of fifty-five with two unfavorable choices. They could either retire within the six-month window period and take their lump-sum benefit or they could continue to work for Mobil but risk eligibility for the lump-sum benefit in the future. Both of these choices were less favorable than their status quo prior to the July 1984 amendment—staying with Mobil until normal retirement age with the assurance of eligibility for the lump-sum payout. Thus, according to this theory, Mobil willfully violated the ADEA by putting its employees to a "coercive choice" that resulted in a constructive discharge—the employees were forced to retire within the window period and to forfeit their current salaries and future increased benefits.

In January 1992, the Fifth Circuit decided the Christopher case, holding that an ADEA "constructive discharge" claim based on Mobil's retirement plan amendments and related nondisclosures was barred by the applicable statute of limitations. The plaintiffs in this case then artfully amended their complaint, purporting to drop their ADEA "constructive discharge" claim by asserting a newly labeled "fraudulent discharge" claim in its place. The essence of plaintiffs' "fraudulent discharge" claim is as follows: After announcing the July 1984 amendment, Mobil adopted a September 1984 amendment which contained a "waiver provision" that allowed employees to receive a lump-sum benefit even if they did not meet the threshold requirements imposed by the July 1984 amendment. Plaintiffs argue that Mobil concealed facts about this waiver provision that would have informed them that Mobil would have been required to grant waivers to virtually all of its employees. Had they known about the waiver provision, plaintiffs claim they would not have retired. Thus, Mobil's concealment of the waiver provision in the September 1984 amendment allegedly deceived—not coerced—the older workers into retirement.

II. Discussion

Mobil contends that the district court erred in denying its motion for summary judgment on plaintiffs' "fraudulent discharge" claim. We review the district court's denial of summary judgment de novo. Wheeler v. Hurdman, 825 F.2d 257, 260 (10th Cir.), cert. denied, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987).

In Christopher, three former Mobil employees brought claims in 1989 under the ADEA based on Mobil's 1984 retirement plan amendments and Mobil's "alleged failure to disclose to appellants all of the options available under the amended plan." Christopher, 950 F.2d at 1212. The district court granted Mobil's motion for summary judgment on these ADEA claims and the three employees appealed. The Fifth Circuit held that these claims were barred by the ADEA's statute of limitations, which began to run in July 1984 when the retirement plan amendments were adopted. Id. at 1217.

Based on Christopher, Mobil argues that the plaintiffs' ADEA claim for "fraudulent discharge" in this case is time-barred. We agree. Plaintiffs' claim is virtually identical to the one brought in Christopher. See Raymond, 983 F.2d at 1530 n. 2 ("The plaintiffs in Christopher argued that the concealment of the waiver option was fraudulent, and plaintiffs in this case have, following Christopher, made the same fraud argument concerning the waiver option."). The "constructive discharge" claim in Christopher was based on Mobil's retirement plan amendments and its alleged concealment of the waiver provision. In this case, plaintiffs have labeled their claim a "fraudulent discharge" claim, alleging that Mobil's concealment of the waiver provision deceived them into retiring. Plaintiffs' attempt to distinguish their "fraudulent discharge" claim in this case from the ADEA claim brought in Christopher is merely an exercise in semantics. Although the plaintiffs here bring a "fraudulent discharge" claim, it is based on the same theory alleged by the

plaintiffs in Christopher—that Mobil's concealment of the waiver provision caused them to opt for early retirement. We will not allow the plaintiffs to artfully plead around the Christopher decision by recharacterizing their claim as a "fraudulent discharge" claim. We adopt the reasoning of the Fifth Circuit and hold as a matter of law that plaintiffs' "fraudulent discharge" claim is barred by the ADEA's statute of limitations. See Christopher, 950 F.2d at 1213-17.

For the foregoing reasons, we REVERSE the district court's denial of Mobil's motion for summary judgment on plaintiffs' ADEA claims and REMAND for entry of summary judgment in favor of Mobil.

APPENDIX B

Denial of Motion for Summary Judgment of the United States District Court for the District of Colorado, dated March 18, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-Z-2112

FREDERIC J. RAYMOND, *et al.*,
Plaintiffs,

vs.

MOBIL OIL CORPORATION, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT

(Hearing on Motion for Summary Judgment on ADEA Claims: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 5:10 p.m., on the 18th day of March, 1993, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

RODNEY R. PATULA and MICHAEL G. BOHN, Attorneys at Law, Pryor, Carney and Johnson, 6200 South Syracuse Way, Suite 400, P.O. Box 6559, Englewood, Colorado, 80155-6559, appearing for the plaintiffs.

HAROLD A. HADDON and SASKIA A. JORDAN, Attorneys at Law, Haddon, Morgan & Foreman, 150 East 10th Avenue, Denver, Colorado, 80203; MICHAEL E. TIGAR, Attorney at Law, 727 East 26th Street, Austin, Texas, 78705, and MARY ANN DOYLE, Attorney at Law, Debevoise & Plimpton, 875 Third Avenue, New York, New York, 10022, appearing for the defendants.

(The following proceedings were had and entered of record after the Court heard the arguments of Counsel:)

RULING

THE COURT: The Court is satisfied that there can be more than one cause of action, more than one theory under more than one claim, under ADEA.

I am also satisfied that there was one claim, one cause of action, in front of the *Christopher* court. The language of the *Christopher* case was, on page 1214, that "the nondisclosure asserted by the plaintiffs does not form a material part of appellants' constructive discharge theory that would prevent the statute of limitations from commencing."

We know that *Christopher* considered the fraud allegations, but they considered them in the context of whether they added anything to the underlying and to the one constructive discharge claim.

We know that the Tenth Circuit case of *Pike* indicates that had there been a fraud allegation, had the claim been, as they put it, "fraud alleged to entitle him to relief" that there would have been a different result most likely on the statute of limitations argument.

We know on *Richards*, which has been discussed—and I'm not sure if the cite was put on the record: 662 F.2d 1965—that the court held that the plaintiff's complaints there stated allegations of fraud which were dis-

covered in 1978 and which were sufficient to toll the statute of limitations, even though the plaintiff knew certain facts about discrimination against him in 1955 that he didn't discover because of fraud at a later time.

I don't know what the *Christopher* court would have done had they had the two fraud cases that are before this court before them. And I'm not certain that the Tenth Circuit by a somewhat ambiguous footnote is giving an advisory opinion to the Court about what should be done concerning statute of limitations on a fraud claim in ADEA.

Suffice it to say that I do agree with the arguments argued by the plaintiff at least sufficiently that I am—I would be extremely uncomfortable in granting the motion for summary judgment of the defendants. It seems to me that from a legal theory point of view, plaintiffs' arguments make sense. Indeed, there can be more than one discriminatory act, more than one discriminatory time for an act under ADEA; and you have to look not to what the facts are, because indeed, the facts here probably are the same facts that the *Christopher* court was considering, but what the cause of action is.

So because the Court does agree with the reasons argued by the plaintiffs, the defendants' motion for summary judgment will be denied.

Now, it may very well be that the Tenth Circuit agrees with the defendant, because Mr. Tigar is a powerful attorney and makes a powerful argument; but I have to at least decide this issue on my understanding of the law as best I can.

Mobil's motion for summary judgment on the ADEA claims will be denied; however, in view of the Tenth Circuit opinion that has just come down, the mandate that has just come down, the Court will order that summary judgment enter in favor of defendant and against the plaintiffs on the plaintiffs' ERISA claims; and those claims will be dismissed.

* * * *

No. 93-1082 (2)

Supreme Court, U.S.
FILED
JAN 18 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

JOHN A. MORRISON, *et al.*,

Petitioners,

—v.—

MOBIL OIL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: January 18, 1994

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993
No. 93-1082

JOHN A. MORRISON, *et al.*,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Mobil Oil Corp. ("Mobil") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision by the Court of Appeals for the Tenth Circuit in this case.[1]

The decision below rests on a summary judgment record with no material factual disputes. The court of appeals applied well-established principles to a routine statute of limitations case in which petitioners — though they concededly were notified of the employment action at issue — allowed the filing and limitations periods of the Age Discrimination in Employment Act ("ADEA")

[1] A list of Mobil's parent and non-wholly-owned subsidiaries, required by Sup. Ct. R. 29.1, is found in the Supplemental Appendix ("SA") to this opposition at SA-23.

to run on their claims. Petitioners waited four and one-half years to sue, and filed their charges with the Equal Employment Opportunity Commission ("EEOC") only after that tardy suit was filed.

The Tenth Circuit's unanimous decision accords with ADEA, and with the decisions of this Court and every circuit that has considered analogous claims. The Tenth Circuit's ruling is also consistent with the principles set forth in four prior court of appeals decisions stemming from litigation brought by petitioners' same lawyers in factually identical cases.[2] The decision below raises no substantial federal issue, and there is no reason for review by this Court.

COUNTERSTATEMENT OF THE CASE

The petitioners' tendentious and argumentative Statement of the Case [at 2-11] contains a litany of charges against Mobil that are inaccurate, misleading, without record support and differ significantly from the material facts and relevant holdings set out in the opinion below and previous Tenth and Fifth Circuit decisions dealing with the same Mobil Retirement Plan amendments at issue here. The charges are, however, completely irrelevant to the issue decided below. The key undisputed material fact that petitioners cannot evade is that they knew the essential elements of their ADEA discharge claims in 1984 and did not file those claims with the EEOC or bring them to court until four and one-half years *after* Mobil definitively announced the employment decision that is the basis of petitioners' claims.[3]

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[2] The Court below expressly "adopt[ed] the reasoning of the Fifth Circuit" in *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir.), *cert. denied*, 113 S. Ct. 68 (1992) in holding petitioners' claims time-barred. [Petitioners' Appendix ("A") A-5a.] The *Christopher* opinion is found at SA-1.

[3] Under the statutory provisions then in effect, petitioners were required (a) to bring EEOC charges within 300 days (29 U.S.C. § (continued...)

A. Factual Background.

Mobil's Retirement Plan (the "Plan") pays retired employees a specified pension benefit based on years of service, salary history and life expectancy. The normal form of benefit under the Plan was, at all relevant times, a lifetime monthly annuity. [SA-2.] In 1977, Mobil added an option that allowed employees to receive the actuarial equivalent of their annuities in a single lump-sum payment, reduced to present value by a 5% interest rate. To protect the integrity of plan assets and the economic security of retirees, the lump sum option was limited to those employees who had either an accrued pension benefit or a net worth (excluding their pension benefit) of at least $250,000. [*Id.*]

In 1984, Mobil raised the eligibility level to $450,000 and raised the interest rate prospectively to 9½% to account for inflation and soaring interest rates. On July 2, 1984, Mobil announced these changes, which would apply to retirements after January 1, 1985. Any retirement-eligible employee therefore had the option of (a) retiring within this six-month "window" period and taking the lump sum under the old rules, or (b) continuing to work and retiring later under the amended Plan. [SA-2-3.] Petitioners all retired on or before January 1, 1985 and concededly received a check for the full amount of their lump-sum benefits.[4]

3(...continued)
626(d)(2)); and (b) to file a lawsuit within three years (29 U.S.C. §§ 626 (e)(1), 255(a)) after the alleged discrimination occurred. Although petitioners do not inform this Court of the EEOC charge-filing requirement, their failure to comply with that provision is itself a sufficient ground for dismissal of their ADEA claims as time-barred. [SA-5, 10-11.]

[4] Petitioners' description of Mobil's actions in amending the Plan and obtaining Internal Revenue Service ("IRS") approval of the amendments [at 2-8] is misleading and at odds with the previous rulings of the Tenth and Fifth Circuits. *See Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1529-30 (10th Cir.), *cert. denied*, 114 S. Ct. 81 (1993); *Christopher* at SA-2-3. As those opinions underscore, Mobil sought a (continued...)

B. Related Cases.

1. *Mitchell v. Mobil Oil Corp.*

Like petitioners, Porter Mitchell retired from Mobil during the six-month window period that ended on January 1, 1985, and elected to receive his retirement benefits in a lump sum. Mitchell filed a *timely* EEOC charge in 1985 and a *timely* complaint in 1986 claiming violations of ADEA and ERISA. [SA-7.] On appeal, the Tenth Circuit reversed a judgment and jury verdict in favor of Mitchell and held that "Mobil did not violate the ADEA," because Mobil had legitimate business reasons for amending the Plan, and Mitchell had presented no evidence that these were a pretext for age discrimination. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-73 (10th Cir. 1990). The Court also held that Mitchell lacked standing to sue under ERISA. *Id.* at 474. This Court denied certiorari. 498 U.S. 898 (1990).

On December 30, 1988, less than three weeks after the *Mitchell* verdict, but before it was reversed by the Tenth Circuit, Mitchell's lawyers brought this class action, *Raymond v. Mobil Oil Corp.*, Civ. Action No. 88-Z-2112 (D.C. Colo.),[5] without even attempting to exhaust EEOC remedies. EEOC charges were not filed until a month *after* the lawsuit was filed.

4(...continued)
determination from the IRS that the Plan, as amended, continued to meet the Internal Revenue Code's requirements for favorable tax treatment. 26 U.S.C. § 401(a)(4). As a result of meetings with the IRS, Mobil submitted to the IRS an additional provision that let Mobil in its sole discretion, waive the $450,000 eligibility threshold in individual cases for valid cause shown, under the claim and appeal procedures of the Plan. On November 23, 1984, the IRS issued a favorable determination letter approving Mobil's amendments. [SA-3.]

[5] During the pendency of this appeal in the Tenth Circuit, Mr. Raymond withdrew as a named plaintiff and class representative. This class action is now captioned *Morrison v. Mobil Oil Corp.*

2. *Christopher v. Mobil Oil Corp.*

Similarly, in the wake of the *Mitchell* verdict but before its reversal, another group of retirees filed EEOC charges (which the EEOC ruled untimely), and sued Mobil alleging ADEA, ERISA and state law violations. *Christopher v. Mobil Oil Corp.*, Civ. No. B-89-0653-CA (E.D. Tex.). The Texas district court granted Mobil's motion for summary judgment on all claims. The Fifth Circuit affirmed the dismissal of the ADEA discharge claims. "[E]ven accepting . . . [the *Christopher* plaintiffs'] charges of nondisclosure . . . [no] genuine issue of material fact exists as to when the statute of limitations on the ADEA claims commenced." [SA-11.] In July, 1984, Mobil retirees clearly knew enough to bring their ADEA discharge claims to court and to invoke the Congressionally-mandated EEOC administrative process. [SA-10-11.] The Court also held the doctrines of equitable tolling and estoppel inapplicable because the *Christopher* plaintiffs were "not deceive[d] . . . as to the facts of the alleged discrimination." [SA-11.]

C. Proceedings Below.

After the Fifth Circuit's decision in *Christopher*, the plaintiffs amended their complaint and Mobil moved for summary judgment on their ERISA and ADEA claims.[6]

In the decision for which review is now sought, the Tenth Circuit held petitioners' ADEA discharge claims time-barred. [A-5a.] The Court expressly adopted the reasoning of the Fifth Circuit in *Christopher*, rejected petitioners' argument that their ADEA "fraudulent discharge" claims in this case were any different from the "constructive discharge" claims ruled time-barred in

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[6] On the ERISA claims, the Tenth Circuit held, as it had in *Mitchell*, that the plaintiffs had no standing to sue. *Raymond v. Mobil Oil Corp.*, 983 F.2d at 1536. The court found that the plaintiffs' allegations of fraud "made no legal or conceptual difference" to discharge claims under ERISA. *Id.* This Court denied certiorari. 114 S. Ct. 81 (1993).

Christopher, and held that plaintiffs' theorizing and tergiversation were simply "artful pleading," and an "exercise in semantics." [A-4a-5a.] The panel heard oral argument on September 27, 1993, and promptly issued its written opinion on October 6, 1993.

REASONS FOR DENYING THE WRIT

I.
The Tenth and Fifth Circuits Correctly Decided the ADEA Statute of Limitations Issues Applying Well-Established Law to the Undisputed Facts.

Two unanimous courts of appeals reviewed virtually identical evidentiary records, considered the same allegations of fraud and the same arguments made by the same lawyers, applied well-established principles of accrual, equitable tolling and estoppel to indistinguishable ADEA discharge claims and found petitioners' claims time-barred.

1. This Court has long taught that, in employment discrimination cases, the EEOC filing and limitations periods begin to run at the time the adverse employment decision "was made and communicated" to employees. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). Given the specific facts of this case, the Fifth and Tenth Circuits held these periods commenced on July 2, 1984, when Mobil announced the Plan amendments and the six month window period to all Mobil employees. The "unfavorable choice to which [the announcement] put 'window' employees and its particular impact on employees over fifty-five were both apparent on the face of the plan amendment." [SA-7.] From that date on petitioners knew of their alleged injury under the statute (discharge because of their age), and its cause (Mobil's Plan amendments).[7] Under all relevant authority, as petitioners

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[7] Despite petitioners' claims to the contrary, the court below reviewed significant evidence of petitioners' awareness of alleged discrimination in 1984. In contemporaneous retirement notices, letters, (continued...)

themselves admit, the statute of limitations on their constructive discharge claims began to run at that time.

2. Petitioners mention, but do not analyze, the law of equitable tolling. Their contentions in this respect, however, were specifically addressed and decided against them by the Tenth and Fifth Circuits. Those courts found, even crediting petitioners' baseless allegations of misconduct for summary judgment purposes, that Mobil "did not deceive [plaintiffs] as to the facts of the alleged discrimination," and what was known to them in July 1984 was sufficient "to put [them] on notice of possible age discrimination . . . and to require them to assert their rights." [SA-11.]. *See, e.g., Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (where plaintiff knows facts to support ADEA discharge cause of action, attempts to conceal are irrelevant for limitations purposes); *Gore v. Pee Dee Farm Service*, 1 F.3d 1233 (4th Cir. 1993), *affirming*, Civ. A.3:90-825-17, 1992 WL 373129, (D.S.C. 1992) (same); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 645 (5th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (same). These decisions are required by the instruction from this Court that equitable tolling doctrines are to be narrowly construed. *See, e.g., Irwin v. Veterans Admin.*, 498 U.S. 89, 96 (1990) (equitable relief is extended "only sparingly;" limited to "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) ("One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence" or toll running of the statute.).

7(...continued)
and interviews, petitioners openly stated their belief that they had been discriminated against. In their depositions, many petitioners acknowledged under oath that they had believed in 1984 that the employment action at issue was age discriminatory. Porter Mitchell clearly stated that belief when he went to the EEOC in 1985 and to court in 1986. *See also* SA-7.

3. In employment discrimination cases, there are special reasons for requiring an employee to act with diligence: the EEOC and state agencies that fulfill the same function cannot investigate and mediate if they are not consulted until years after the event. Additionally, "[t]he statute of limitations is short in age discrimination cases . . . because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). This is amply illustrated here where petitioners did not even file an EEOC charge until *after* they had filed their lawsuit. By that time, they claimed damages of millions of dollars. The requirement of diligence is not onerous. The employee's charge is not the equivalent of a judicial complaint and does not need to be detailed to invoke the EEOC's jurisdiction. *See id.* at 452; *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984).

II.
The Tenth and Fifth Circuits Correctly Found No Reason To Depart From Established Statute of Limitations Principles.

In the face of these settled limitations principles and the unchallenged evidence of what they knew about their ADEA discharge claims, petitioners do not even try to argue that they could not have brought EEOC charges or claims against Mobil until December 1988. Instead, to avoid the inevitable conclusion that they waited too long, they contend that they can split their ADEA cause of action for limitations purposes and maintain two separate ADEA causes of action for a single discharge, one for "constructive discharge" based on the allegedly unfavorable choice to which they were put, and one for "fraudulent discharge" based on allegations of concealment. As the Tenth Circuit held, petitioners' argument is merely an "exercise in semantics." [A-4a.]

1. Petitioners cite no case that recognizes their allegedly different cause of action for "fraudulent discharge," finds fraud to be an essential element of an ADEA discharge claim, or supports their contention that they can deliberately forego ADEA

constructive discharge claims and, after the EEOC filing and limitations periods have run, bring other claims challenging the same discharges under the same statute, simply by adding allegations of nondisclosure.[8] This theory was rejected by the Tenth and the Fifth Circuits because it has no basis in the ADEA statute that creates a cause of action for discharge, 29 U.S.C. § 623(a)(1), nor in the limitations period provided by Congress for filing an EEOC charge and a lawsuit.

2. As the Tenth and the Fifth Circuits both held, petitioners' "fraudulent discharge" is no different from their "constructive discharge" (which petitioners admit is time-barred).[9] Both of these alleged causes of action: (1) seek recovery from the same entity, Mobil; (2) invoke the same legal rights, those prohibiting discharge because of a person's age; (3) are based on the same conduct, Mobil's 1984 Retirement Plan changes and the alleged nondisclosures related to those amendments; and (4) seek redress for the same injury, allegedly involuntary retirement. Thus, the nature and source of the duty, the operative facts, and the injury suffered are identical, regardless of whether petitioners characterize their claim as actual discharge, constructive discharge, "fraudulent" discharge or any other kind of discharge.

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[8] In other contexts, this Court has explicitly rejected the notion that separate causes of action can be created by merely alleging additional facts or theories concerning the same injury. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n.4 (1976) (Fed. R. Civ. P. 54(b): "a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief); *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14 (1951) (removal: "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action").

[9] Contrary to their assertion [at 10, 13], petitioners' "fraudulent discharge" claim was fully litigated — and dismissed — in *Christopher*. The *Christopher* complaint, the Fifth Circuit briefs and rehearing petition (all part of the record below), as well as the *Christopher* opinion itself, amply support the Tenth Circuit's determination that the claims in this case are "virtually identical" to those in *Christopher*. [A-4a.]

3. Petitioners also argue that this Court should review the decision of the Tenth Circuit because a conflict exists between the application of *Ricks* in this case and the "federal discovery rule." [at 11-12]. Petitioners are simply wrong here as well:

First, they misstate this Court's rulings in *Ricks* and *Chardon v. Fernandez*, 454 U.S. 6 (1981), by asserting that the limitations period begins to run when the "discriminatory decision [was] made," [at 11] omitting the critical element of communication to the employee. Indeed, "[t]he [federal] discovery rule is implicit in the holding of *Ricks*," because the *Ricks* rule incorporates the notion of *communication* of the injury to the employee. *Cada*, 920 F.2d at 450. This accords with this Court's traditional statute of limitations teaching that a prospective plaintiff need only be "in possession of the critical facts that he has been hurt and who has inflicted the injury. . . . There are others who can tell him if he has been wronged, and he need only ask." *United States v. Kubrick*, 444 U.S. 111, 122 (1979). The Tenth and the Fifth Circuits correctly found these "critical facts" to be in the possession of Mobil employees by July 2, 1984.

Second, there is no need to depart from *Ricks* in this case.[10] Contrary to petitioners' assertion [at 11], this is "an ordinary employment discrimination case." Every constructive discharge case includes elements of nondisclosure and could be argued as a "fraudulent" discharge. The essence of the claim is that the employee was forced out for a pretextual reason. If the mere allegation that an employer had not made full disclosure to an employee were enough to avoid the statute of limitations, the statute

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[10] Petitioners' citations to other rulings of this Court are plainly inapposite. In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), the alleged fraud prevented plaintiffs from knowing the *identity* of a defendant. *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), holds that a plaintiff has no disparate treatment cause of action under ADEA when the factor motivating the employer is something other than age. It says nothing about when an ADEA discharge cause of action accrues or whether a cause of action exists for "fraudulent discharge."

would never run, or it would be tolled in every employment discrimination case. *Blumberg*, 848 F.2d at 645.

Third, it is clear from the record that petitioners filed this class action lawsuit in December 1988, not because they had then "discovered" elements essential to their ADEA discharge cause of action, but because they had heard about Porter Mitchell's verdict, before it was reversed by the Tenth Circuit and before their coworkers' identical claims were dismissed as untimely by the Fifth Circuit.

CONCLUSION

As the Tenth and the Fifth Circuits have held, as a matter of established law and undisputed fact, by the time petitioners filed their EEOC charges in 1989 and this case in 1988, their ADEA discharge claims were time-barred.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Mobil Oil Corporation

January 18, 1994

SUPPLEMENTAL APPENDICES

Opinion of the United States Court of Appeals for the Fifth Circuit, January 24, 1992

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-4562

Jan. 24, 1992

GERALD W. CHRISTOPHER, Charles L. Prunty, and Billy G. Turner,

Plaintiffs-Appellants,

—v.—

MOBIL OIL CORPORATION, Retirement Plan of Mobil Oil Corporation and Rex Adams,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Before:

HENLEY,* KING, AND GARWOOD,

Circuit Judges.

GARWOOD, *Circuit Judge:*

Appellants brought claims under the Age Discrimination in Employment Act (ADEA) and the Employee Retirement Income Security Act (ERISA), as well as various common-law claims including fraud, civil conspiracy, and breach of the employment contract, against their former employer Mobil Oil Corporation, based on Mobil's 1984 amendment of its employee benefit plan and

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* Circuit Judge of the Eighth Circuit, sitting by designation.

alleged failure to disclose to appellants all of the options available under the amended plan. The district court granted Mobil's motion for summary judgment on the ADEA claims on the grounds that the claims were time-barred and that as a matter of law appellants were not constructively discharged in violation of ADEA. The district court also granted Mobil's request for judgment on the pleadings on appellants' state law claims on the ground that they were preempted by ERISA, and dismissed the ERISA claims on the ground that because appellants were not participants seeking to recover benefits from a retirement plan, the court lacked jurisdiction over their ERISA claims. We affirm in part and reverse and remand in part.

Facts and Proceedings Below

The following facts are drawn from the parties' submissions of undisputed facts in connection with Mobil's motions for summary judgment, judgment on the pleadings, and dismissal.

Mobil provides retirement benefits for its employees through a defined benefit plan, under which employees receive a pension based on years of service, salary history, and life expectancy. Until 1977, the standard method of receiving these pensions was in the form of an annuity. In that year, however, Mobil added a lump sum option, enabling certain employees to receive the actuarial equivalent of their annuity, discounted at five percent, in one payment following retirement. To be eligible for the lump sum option, an employee had to have either an accrued lump sum pension benefit, or a net worth independent of the pension, equal to at least $250,000. Also, the employee was required to be at least fifty-five years old.

On July 2, 1984, Mobil announced changes to the lump sum option of the retirement plan, including (1) an increase in the discount rate from 5% to 9.5%, to operate prospectively, *i.e.*, to be applied to all earnings after January 31, 1985; (2) an increase in the eligibility threshold from $250,000 to $450,000; and (3) a linking of the new threshold to the Consumer Price Index. These changes, which were announced as subject to Internal Revenue Service (IRS) approval, would apply to all employees retiring after January 31, 1985; thus, employees otherwise eligible to retire had a six-month window in which they could retire subject to the lower threshold

and lower discount rate. The choice was a significant one for employees who met the $250,000 threshold but who were uncertain ever to meet the indexed $450,000 threshold because, with market interest rates well above 5%, the lump sum pensions were worth 40% more than the annuities. Appellants, Gerald Christopher, Charles Prunty, and Billy Turner, were among the approximately 1,100 Mobil employees who elected to take early retirement during the 6-month window. All three submitted their retirement notices between August and October 1984, and retired as of January 1, 1985.

On July 16, 1984, Mobil sought a determination from the IRS that the plan as amended continued to meet the Internal Revenue Code's requirements for favorable tax treatment, including the requirement that pension plans not "discriminate in favor of highly compensated employees." 26 U.S.C. § 401(a)(4). In meetings in late September 1984, the IRS reviewing agent expressed concern that the amended plan could result in benefits favoring highly compensated employees, and indicated that he might need to seek technical advice from Washington. In response, Mobil adopted another plan amendment allowing Mobil, in its sole discretion, to waive the eligibility threshold in individual cases for valid cause shown. After insertion of this provision, the IRS issued to Mobil a favorable determination letter on November 23, 1984, noting that continued qualification of the plan would depend upon its effect in operation.

Mobil announced the IRS approval to its employees on December 21, 1984, but did not notify its employees of the waiver provision until well after expiration of the six-month window — October 1985. Because of a 1985 IRS revenue ruling and subsequent pronouncements, Mobil eventually entirely deleted the lump sum eligibility threshold in 1986.

Appellants filed age discrimination charges against Mobil with the Equal Employment Opportunity Commission (EEOC) on March 1, 1989. They alleged that Mobil's conduct in amending the plan and concealing the waiver provision was a concerted scheme to reduce its work force. By purporting to increase the lump sum threshold and concealing its awareness that applicable tax law precluded that action, appellants charged, Mobil induced hundreds of older employees into retirement without the need to pay them an

early retirement bonus. The EEOC dismissed the charges as untimely filed. Appellants then commenced this suit on July 7, 1989. They alleged that Mobil's conduct constituted age discrimination in violation of ADEA, 29 U.S.C. §§ 621 et seq., as well as common-law fraud, civil conspiracy, unlawful interference with contract rights, breach of the employment contract, negligence, and gross negligence. In the event that appellants' state law claims were held to be preempted by ERISA, the complaint alleged in brief and conclusory fashion that Mobil's conduct violated ERISA, apparently ERISA § 510, 29 U.S.C. § 1140, prohibiting interference with an employee's attainment of a right under ERISA. For all claims, appellants sought the wages and employment benefits they would have received had they continued working until normal retirement age. On the ADEA claims, appellants also requested reinstatement.

Mobil moved for summary judgment on the ADEA and state law claims. The district court granted the motion, finding that the ADEA and state law claims were time-barred, that appellants had not been constructively discharged in violation of the ADEA, and that appellants' claims of discrimination arose from changes in fringe benefits available under a bona fide retirement plan, not from discrimination in nonfringe aspects of employment, and thus were not within the purview of the ADEA according to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2). Simultaneously, Mobil moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the state law claims on the ground that they were preempted by ERISA, and dismissal under Federal Rules of Civil Procedure 12(b)(1) & (6) of the contingent ERISA claim on the ground that appellants were not "participants" seeking to recover benefits under ERISA § 502, 29 U.S.C. § 1132, depriving the court of jurisdiction. The district court granted this motion as well.

Discussion

I. ADEA Claims

We first examine the district court's grant of summary judgment on the ADEA claims on the ground that they were time-barred. In reviewing a grant of summary judgment, all legitimate factual inferences presented by the record are drawn in favor of the party opposing the motion. *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir.1990) (per curiam). We can uphold the summary judgment only if our review demonstrates that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. *Id.*

It is not disputed that the applicable statutes of limitations require an employee to file an age discrimination charge with the EEOC within 300 days after the alleged unlawful practice occurred, 29 U.S.C. § 626(d)(2), and to file a lawsuit within 3 years after the alleged unlawful practice occurred, 29 U.S.C. §§ 255(a), 626(e). Appellants argue, however, that a genuine issue of material fact exists as to when their awareness of the facts constituting the alleged age discrimination was sufficient to commence the running of the limitations period. *See Pruet Production Co. v. Ayles*, 784 F.2d 1275, 1279 (5th Cir.1986) ("[T]he statute does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with reasonably prudent regard for his rights." (quoting *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir.1975))). Specifically, they argue that Mobil's negotiation of a revised plan in October 1984 only came to light in 1988 when counsel for another former employee, Porter Mitchell (Mitchell), suing Mobil in federal district court in Colorado, discovered the correspondence between Mobil and the IRS. It was only when this fact became publicly known at the trial of *Mitchell v. Mobil Oil Corp.* in December 1988,[11]

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[11] The alleged fraud was not part of Mitchell's claims against Mobil. He argued, rather, that the plan amendment itself constituted a constructive discharge and was a willful violation of the ADEA. He also

(continued...)

appellants argue, that they had any reason to know of Mobil's concealment of the waiver option. Appellants' EEOC filing in March 1989 and their commencement of this suit in July 1989 would both have been timely if the statute of limitations had commenced running in December 1988.

Evaluating the appellants' claim that the statute of limitations did not commence until December 1988 requires an analysis of the nature of their ADEA claim. The ADEA forbids an employer to "discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). A "discharge" within the meaning of this section may be constructive if a reasonable person in the employee's position would have felt compelled to resign under the circumstances. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An attractive early retirement offer, however, is not a constructive discharge merely because it creates a strong incentive to retire; an early retirement option can constitute a constructive discharge only if the employee shows that it sufficiently alters the status quo that each choice facing the employee makes him worse off. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 467 (10th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990); *Bodnar*, 843 F.2d at 193.

11(...continued)
argued that Mobil had breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, and had violated ERISA's anti-cutback provision, ERISA § 204(g), 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump sum option, an accrued benefit. The jury found in favor of Mitchell on his ADEA claim and awarded him damages for back pay, front pay, and lost benefits. The district court held in favor of Mitchell on the ERISA claims as well, awarding him compensatory and liquidated damages. On appeal, the Tenth Circuit reversed, holding that Mitchell had failed to prove that Mobil's proffered justification for the plan amendment was a mere pretext for discrimination, and that Mitchell was not a participant with standing to assert ERISA claims. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-74 (10th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The gist of appellants' *prima facie* ADEA claim is as follows. The adoption of the 1984 plan amendment presented appellants with a choice between unfavorable options; they faced the choice of retiring within the six-month window or staying on at Mobil but possibly forgoing eligibility for the lump sum payout. Either could be regarded as less favorable than staying on at Mobil until normal retirement age with the assurance of eligibility for the lump sum payout, which was the "status quo" when the amendment was adopted. The asserted discriminatory character of the amendment to the plan arises from the fact that only employees over the age of fifty-five were put to that choice. Employees under fifty-five did not presently qualify for retirement, so although the plan amendment may have defeated an expectation for them, they were not confronted with the possibility of losing a benefit for which they were then qualified. *See Mitchell*, 896 F.2d at 496.

This much of the ADEA theory was evident in July 1984 upon the initial announcement of the plan. The unfavorable choice to which it put "window" employees and its particular impact on employees over fifty-five were both apparent on the face of the plan amendment. Indeed, the theory outlined above was precisely Mitchell's claim against Mobil, accepted by the Tenth Circuit. Mitchell filed a complaint with the EEOC on April 25, 1985, with no knowledge of Mobil's alleged concealment of the waiver provision. Moreover, another employee, Frederic J. Raymond (Raymond), filed a similar charge with the Ohio Civil Rights Commission and the EEOC on May 10, 1985. Therefore, unless appellants can show that Mobil's alleged concealment adds a material element to their ADEA claim, the statute of limitations should have commenced running in July 1984.

Appellants have offered no theory under which the alleged nondisclosure is a necessary element. They refer us to the Fourth Circuit case of *Stone v. University of Maryland Medical System Corp.*, 855 F.2d 167 (4th Cir. 1988), for their argument that "where, as here, the employee surrenders his job as a proximate result of fraud and deceit by the employer, the voluntariness of the retirement or resignation is fundamentally vitiated." *Stone* is one of a series of cases where resignations have been held to be involuntary based on an employer's misrepresentations about or nondisclosure of an employee's rights. Others include *Covington v.*

Department of Health and Human Services, 750 F.2d 937 (Fed.Cir.1984), and *Scharf v. Department of the Air Force*, 710 F.2d 1572 (Fed.Cir.1983).

We do not believe that these cases avail appellants, however. As appellants' phrasing of their argument reflects, the effect of a showing of fraud in these cases is to render an otherwise voluntary choice involuntary. *Stone* and related cases involve disputes in which public employees were entitled to certain procedural protections if they were to be terminated involuntarily; they were required to show that their retirement was involuntary to invoke the jurisdiction of the Merit Systems Protection Board or to establish a "deprivation" under the due process clause. Here, by contrast, appellants allege a constructive discharge arising from the choice to which they were put by the plan amendment. To further argue that the actual election made was involuntary because it was based on incomplete information would be superfluous; involuntariness is implicit in appellants' argument that they were coerced into early retirement by the threatened removal of the lump sum option. Assuming, *arguendo* only, that appellants' allegations of nondisclosure would serve to estop Mobil from raising in defense the claim that appellants' retirement was voluntary, nevertheless the asserted nondisclosure does not form a material part of appellants' constructive discharge theory that would prevent the statute of limitations from commencing.

Appellants' arguments that this Court should apply equitable tolling or equitable estoppel fail for similar reasons. These doctrines provide for tolling of the statute of limitations when a plaintiff's unawareness of his ability to bring a claim — either unawareness of the facts necessary to support a discrimination charge or unawareness of his legal rights — is due to defendant's misconduct. *See Rhodes v. Guiberson Oil Tools Division*, 927 F.2d 876, 878-79 (5th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 198, 116 L.Ed.2d 158 (1991); *Kale v. Combined Insurance Co.*, 861 F.2d 746, 752 (1st Cir.1988). Here, the knowledge allegedly concealed from the employees was that they had a third option — to continue their employment and apply for a waiver from the higher lump sum requirement. Therefore, the facts as known to the employees in 1984 actually gave them a *better* ADEA claim than they would have had with full knowledge. Whatever

nondisclosures Mobil is guilty of would not have lulled appellants into postponing assertion of their rights; if anything, it would have made them *more* likely to assert that they were constructively discharged.

Finally, appellants argue that although they knew in 1984 of the plan amendment and retirement window, they were misled into believing that they had no cause of action by Mobil's plausible justifications for its amendment of the plan, *i.e.*, that the threshold was changed to adjust for intervening inflation and that the discount rate was raised to align Mobil's practice with that of its competitors and to more realistically reflect current interest rates. In other words, appellants contend that although the discriminatory *effect* of the amendment was apparent in 1984, it was only upon learning of the concealment of the waiver option that they had reason to believe the plan amendment was actuated by age bias and that the alleged concerted scheme to reduce the work force began to take shape.

We find this argument unpersuasive as well. First, we fail to see how the deception alleged by appellants calls into question Mobil's proffered justifications for the plan amendment. The evidence does not create a genuine dispute as to the factual accuracy of Mobil's proffered justifications. Even if appellants' allegations are true respecting Mobil's having deceived its employees about the validity under applicable tax law of the plan amendment and about the waiver provision, there is no evidence showing that Mobil's announced reasons for the plan amendment were deceptive. This is an issue on which appellants would have had the burden at trial, and they were hence required to meet Mobil's summary judgment motion with summary judgment evidence that would sustain a jury finding in their favor on the issue. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642, 644 (5th Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 781 (1989).

In any event, a showing of deception as to motive supports equitable estoppel only if it conceals the very fact of discrimination; equitable estoppel is not warranted where an employee is aware of all of the facts constituting discriminatory treatment but lacks direct knowledge of the employer's subjective discriminatory purpose. Thus, where an employee was told that he was being discharged

because industry economic downturn required reduction of the work force, and was told that he would be considered for re-hiring, we applied equitable estoppel to hold that limitations on his ADEA claim did not commence until he learned that he had been replaced by a younger employee. *Rhodes*, 927 F.2d at 880-82; *see also Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir.1981) (en banc) (employer's misrepresentation that employee would be reinstated induced foreseeable forbearance in filing ADEA claim); *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir.1983) (employer's explanation to employee that he was dismissed as part of a reorganization furnished grounds for equitable tolling in an ADEA suit until discharged employee learned that a younger replacement had been hired), *cert. dismissed*, 465 U.S. 1091, 104 S.Ct. 2144, 79 L.Ed.2d 910 (1984). By contrast, where an employee knew that he was discharged and replaced by a younger employee, his allegation that the company concealed from him the true reason for his discharge and that it was not until subsequent hirings that the "pattern of age discrimination" became evidence was held insufficient to support equitable estoppel. *Pruet Production Co.*, 784 F.2d at 1279-80; *accord Chapman v. Homco, Inc.*, 886 F.2d 756, 758 (5th Cir.1989), *cert. denied*, 494 U.S. 1067, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); Blumberg, 848 F.2d at 645.[12] The showing required for a *prima facie* employment discrimination claim is minimal, *see Pruet Production Co.*, 784 F.2d at 1279, and when "facts that would support a cause of action are or should be apparent," the statute commences even if the employee is not aware of *all* the evidence that he will ultimately rely upon at trial. *Blumberg*, 848 F.2d at 645 (emphasis added). The showing required at the stage of filing charges with the EEOC is even more lenient, because the purpose of the filing is only to initiate an EEOC investigation. *Pruet Production Co.*, 784 F.2d at 1279.

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[12] This view is consistent with this Circuit's rule in Title VII cases that the limitations period starts running when the plaintiff knows of the discriminatory *act*, not when the plaintiff perceives a discriminatory motive behind the act. *See Merrill v. Southern Methodist University*, 806 F.2d 600, 605 (5th Cir.1986).

Applying those principles here, we conclude that whatever concealment Mobil may have been guilty of did not deceive appellants as to the facts of the alleged discrimination. Rather, appellants were able to evaluate the propriety of their alleged constructive discharge for ADEA purposes immediately. Just as in individual discharge cases the *prima facie* showing is only that the employee has been discharged and replaced by a younger worker, leaving exploration of an employer's motives for the EEOC investigation or pretrial discovery, here the appellants' *prima facie* case for constructive discharge was that older employees alone were put to the unfavorable choice of early retirement or loss of the lump sum option. This fact, apparent in July 1984, was sufficient to put appellants on notice of possible age discrimination (as it did other Mobil employees) and to require them to assert their rights.

For these reasons, even accepting for purposes of our review of the summary judgment appellants' charges of nondisclosure, we do not believe that a genuine issue of material fact exists as to when the statute of limitations on the ADEA claims commenced. Concluding that the district court's grant of summary judgment is supported on that ground, we do not reach the district court's further holding that as a matter of law appellants were not constructively discharged in violation of the ADEA.

II. ERISA Preemption of State Law Claims

We next address the district court's grant of judgment on the pleadings on appellants' state law claims. Appellants charged that Mobil's actions in amending the plan and withholding information about the waiver provision fraudulently induced them to surrender their jobs, were taken pursuant to a plan to reduce Mobil's work force, and breached the duty of good faith and fair dealing owed to appellants by Mobil under their employment contracts. This conduct, appellants alleged, gave rise to claims for fraud, civil conspiracy, breach of the employment contract, unlawful interference with contract rights, negligence, and gross negligence. The district court held these claims were preempted because they "relate to Mobil's Retirement Plan, which is governed by ERISA, and directly overlap with provisions of ERISA."

We turn to the first ground relied upon by the district court, namely that appellants' claims "relate to" an ERISA-governed retirement plan.

ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a), 29 U.S.C. § 1144(a). The Supreme Court has consistently emphasized the expansiveness of the "relate to" standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern. *See, e.g., Ingersoll-Rand Co. v. McClendon,* ____U.S. ____, 111 S.Ct. 478, 482, 112 L.Ed.2d 474 (1990); *FMC Corp. v. Holliday,* ____ U.S. ____, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990); *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549, 1552-53, 95 L.Ed.2d 39 (1987); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890, 2899-2901, 77 L.Ed.2d 490 (1983). The words "relate to" are to be given their "broad common-sense meaning," *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 105 S.Ct. 2380, 2389, 85 L.Ed.2d 728 (1985), and a state law will be pre-empted "if it has a connection with or reference to such a plan." Shaw, 103 S.Ct. at 2900. This Circuit has held that the fact that a claim sought damages measured by pension benefits sufficed as the requisite "connection" to an employee benefit plan for preemption purposes. *Cefalu v. B.F. Goodrich Co.,* 871 F.2d 1290, 1294 (5th Cir.1989). *But see Memorial Hospital System v. Northbrook Life Insurance Co.,* 904 F.2d 236, 247 (5th Cir.1990); *Pizlo v. Bethlehem Steel Corp.,* 884 F.2d 116, 120-21 (4th Cir.1989).

The complaints here focus on Mobil's amendment of an ERISA-governed employee benefit plan and Mobil's disclosure to its employees of the terms of the plan. In addition to calculating their damages by computing lost benefits under the plan, a court adjudicating appellants' claims of a fraudulent scheme to reduce the work force would have to examine, at a minimum, the operation of the plan prior to the amendment, the language of the plan amendments, and Mobil's communication to its employees about the terms of the plan amendments. Given the breadth of the section 514(a) test, we find that these connections are adequate to warrant preemption.

This conclusion is buttressed by decisions of this and other courts addressing claims of fraudulently induced retirement and wrongful termination, which are the crux of appellants' state law claims here. In the closely analogous case of *Lee v. E.I. DuPont de Nemours and Co.*, 894 F.2d 755 (5th Cir.1990), the plaintiffs alleged that they had retired in reliance on their employer's representations that the company was not preparing to adopt an early retirement incentive plan, and they sued their former employer for fraud and negligent misrepresentation in that respect. We held that the claims were preempted under section 514(a). *Id.* at 758; *see also Cefalu*, 871 F.2d at 1295 (breach-of-contract claim for oral misrepresentation that retirement options offered equivalent benefits was preempted); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir.1989) (claim for breach of an oral agreement to pay early retirement benefits was preempted). In a case almost identical to the present one, the Third Circuit held that where employees alleged that an employer's notification of proposed plan amendments misrepresented to them that they would lose a retirement benefit if they did not retire in a window period before the amendments became applicable, their claims were preempted. *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 923 (3d Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991).

In addition, the Supreme Court recently spoke decisively to the question whether a tort claim premised on wrongful discharge to prevent vesting of pension benefits could survive independently of ERISA. In *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990), the Court found that the claim "related to" an ERISA-covered plan under section 514(a). Appellants here seek to distinguish their "wrongful discharge by fraud" claim from the tort claim at issue in *McClendon*. They argue that whereas the existence of a pension plan is a necessary *element* of the cause of action considered in *McClendon* (discharge to prevent vesting of pension benefits), here the pension plan was merely the *subject* of Mobil's fraud. The fraud claim itself, they argue, is conceptually identical to a fraud claim concerning any other subject matter, and ERISA cannot generally preempt state laws prohibiting employers from fraudulently inducing employees to give up their jobs. Appellants rely on *Mackey v. Lanier*

Collections Agency and Service, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), in which the Court noted that lawsuits based on "run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan" are not preempted merely because the suits are brought against an ERISA plan. *Id.* 108 S.Ct. at 2187.

We do not find this argument persuasive. We have previously noted that preempted state law includes any state law cause of action as it relates to an employee benefit plan, even if it arises under a general law which in and of itself has no connection to employee benefit plans. *Cefalu*, 871 F.2d at 1292 n.5. Although there would undoubtedly be cases of fraudulently induced retirement that were not preempted, the specific conduct here, as in *Lee*, *Cefalu*, and *Degan*, relates directly to the operation of an ERISA plan. Superimposing state law fraud standards on the elaborate ERISA provisions governing the content and timing of notice of plan provisions and amendments, *see* ERISA §§ 102, 104(b)(1), 29 U.S.C. §§ 1022, 1024(b), would undercut the goal of uniform national regulation in the manner that section 514(a) seeks to prevent. *See Memorial Hospital System*, 904 F.2d at 245 (observing that preemption is proper where the state law claims address areas of exclusive federal concern, and where they directly affect the relationship among the traditional ERISA entities). In our view, this makes the conduct at issue here a far cry from the "run-of-the-mill" claims alluded to in *Mackey*.[13]

For the same reason, appellants' reliance on *Hartle v. Packard Electric*, 877 F.2d 354 (5th Cir.1989) (per curiam) is misplaced. In *Hartle*, a discharged employee brought suit for wrongful termination and civil conspiracy to unlawfully terminate his

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[13] Appellants also cite *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D.Pa.1987), which does provide more direct support for their argument than the fact that the *subject* of the alleged fraud is pension benefits is incidental and does not warrant preemption. *See id.* at 742. However, we agree with the Seventh Circuit that *Greenblatt* is not consistent with our Circuit's holding in *Cefalu*. *See Lister v. Stark*, 890 F.2d 941, 945 n.10 (7th Cir.1989), *cert. denied*, ____ U.S. ____, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990). Therefore, we, like the Seventh Circuit, decline to follow *Greenblatt*. *See id.* at 945.

employment. Because the general rule in Mississippi was employment at will, he argued that his participation in an employee benefit plan had removed his employment from employment-at-will status and had effectively given him a tenured position. However, because the employer's complained-of conduct did not pertain to the operation of an ERISA plan, we observed that Hartle's claim did "not in any manner implicate the federal regulation of employee benefit plans" and held that preemption was not proper. *Id.* at 356. Here, the employer's conduct *does* relate to the pension plan, and federal regulation of retirement plans is implicated to a much greater degree.

Finally, appellants argue that even if their state law claims are preempted to the extent that the damages sought are deemed to be "benefits," the preemption would not bar the claims in their entirety, and that the claims for lost wages, exemplary damages, and the like, would survive as state law claims. They rely on several cases finding partial preemption only. One is *Krause v. Dresser Industries, Inc.*, 910 F.2d 674 (10th Cir.1990), in which a terminated employee filed claims under the ADEA and for breach of an implied contract for tenured job security. The district court entered summary judgment for the defendant on the breach-of-contract claim insofar as it sought lost pension, health insurance, or life insurance benefits, on the grounds of ERISA preemption. The Tenth Circuit upheld a verdict for the plaintiff on the claim for lost salary, however, stating, "We are at a loss to see how a breach of contract claim solely for lost salary is at all related to an employee benefit plan," and holding that there was no preemption of that claim. *Id.* at 680 (citing *Hartle*, *supra*). Likewise, in *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir.1987), the Ninth Circuit held that an employee's claim of breach of contract and wrongful discharge in part relied on theories independent of the benefit plan and thus was not entirely preempted. *Id.* at 800. Finally, appellants cite *Clark v. Coats & Clark, Inc.*, 865 F.2d 1237, 1245 (11th Cir.1989), for the proposition that the same set of operative facts can give rise to both preempted and unpreempted causes of action.

We conclude that this type of partial preemption is inappropriate in the present case, however. Unlike *Krause*, this case is not one where the main nexus to an employee benefit plan is

only the calculation of damages. Once stripped of its link to the pension plan provided by the measure of damages, the *Krause* plaintiff's claim survived as a suit for lost salary based upon breach of an implied contract of continued employment. Here, by contrast, the basis of the claims themselves is the operation of the pension plan; if appellants' claims were stripped of their link to the pension plans, they would cease to exist. The *Sorosky* and *Clark* courts employed a similar analysis which would support complete preemption in the present case. In *Sorosky*, the court held that Sorosky's claim that Burroughs agreed to provide him with monthly retirement benefits and then sought to prevent him from acquiring those benefits was preempted; it was only breach-of-contract or wrongful discharge theories "that have no relationship to the benefit plan" that survived as independent state law claims. *Sorosky*, 826 F.2d at 800. The *Clark* court confronted an employee's claim that his termination, in addition to being effected for the purpose of interfering with his attainment of pension benefits in violation of ERISA § 510, 29 U.S.C. § 1140, was carried out in a malicious manner that inflicted severe emotional distress upon him. The court held that the tort claim, though it "allude[d] to conduct which was proximate (or even concurrent) in *time* to the alleged ERISA violation," was "wholly remote in *content*"; the employee had "not alleged any conduct on the part of Coats & Clark which relates to the processing of any ERISA covered benefit or claim." *Clark*, 865 F.2d at 1243. However, *Clark* carefully distinguished the employee's claim there from a claim that a refusal to pay pension benefits was itself so outrageous as to amount to intentional infliction of emotional distress, which the court had found to be preempted in *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir.1987).

Because the underlying conduct at issue here cannot be divorced from its connection to the employee benefit plan, we uphold the district court's judgment that the state law claims are preempted in their entirety.

III. ERISA Standing

ERISA grants standing to a "participant" to bring a civil action to enforce his rights under the terms of a plan or to enforce the provisions of ERISA. ERISA § 502, 29 U.S.C. § 1132. The district court granted Mobil's motion to dismiss appellants' ERISA claims on the ground that appellants were not "participants" within the meaning of that section and therefore were not empowered to sue. *See Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285, 1286 & n.3 (5th Cir.1980).

ERISA defines the term "participant" to include "any employee or former employee ... who is or may become eligible to receive a benefit of any type from an employee benefit plan." ERISA § 3(7), 29 U.S.C. § 1002(7). The Supreme Court recently addressed the meaning of the "former employee" component of that definition. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Court observed that the definition referred to "former employees who 'have ... a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Id.* 109 S.Ct. at 958 (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). The Court also construed the "may become eligible" language of section 3(7) to mean that "a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." *Id.*

Mobil argues that appellants do not have standing because they have neither a colorable claim for vested benefits nor a reasonable expectation of returning to covered employment. In Mitchell's suit against Mobil, the Tenth Circuit denied ERISA standing to the plaintiffs on the ground here urged by Mobil. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 252, 112 L.Ed.2d 210 (1990).

The first part of this conclusion finds support in the decisions of this Circuit. We have held that where, as here, retired employees received in a lump sum benefits that were concededly all to which they were entitled under a plan as it existed at their retirement, their claim is for damages, not vested benefits. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir.1985)

(per curiam); *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.), *cert. denied*, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985); *accord Kuntz*, 785 F.2d at 1411. In *Yancy*, the employer announced its intention to modify the interest rate factor used to calculate lump sum retirement benefits, but gave employees approximately three months in which to retire under the older, more generous discount rate. We denied standing to an employee who took early retirement during the three months, received his lump sum payment, then sued alleging that the amendment of the plan violated fiduciary duties imposed by ERISA. We held that, lacking a claim for vested benefits, he could not be deemed a plan "participant." *Yancy*, 768 F.2d at 709.

For the second part of its conclusion—that the plaintiff lacked a reasonable expectation of returning to covered employment — the *Mitchell* court relied on the fact that the plaintiff had not sought reinstatement. *Mitchell*, 896 F.2d at 474; *see also Berger v. Edgewater Steel Co.*, 911 F.2d 911, 922 (3d Cir.1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 1310, 113 L.Ed.2d 244 (1991); *Kuntz*, 785 F.2d at 1411. In the present case, the only request for reinstatement in appellants' original complaint is in the ADEA claim, which we have held to be barred by the statute of limitations. *See* section I, *supra*. However, this request does indicate that appellants do desire court-ordered reinstatement.

We are not convinced that *Firestone* can be read to reduce the standing question to a straightforward formula applicable in all cases. This seems particularly so in cases involving allegations of discharge. ERISA § 510, 29 U.S.C. § 1140, makes it unlawful for an employer to "discharge, fine, suspend, expel, discipline, or discriminate against a participant" for exercising a right provided by ERISA or "for the purpose of interfering with the attainment" of a right provided by ERISA. The Supreme Court's recent *McClendon* decision held that this provision would foreclose the development of any state law cause of action for wrongful termination to prevent vesting of pension benefits. *Ingersoll-Rand Co. v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 485, 112 L.Ed.2d 474 (1990). The implication of the Court's holding that the discharged employee must look solely to ERISA for his remedy is that he would have standing to do so. Nevertheless, it is not

readily apparent that he would have standing under the construction of *Firestone* urged by Mobil; he would be a former employee lacking both a claim for vested benefits and (unless he requested reinstatement) a reasonable expectation of returning to covered employment. It would be unusual if in that situation his ability to assert a claim at all turned on whether or not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing. Cf. *Amalgamated Clothing and Textile Workers v. Murdock*, 861 F.2d 1406, 1418 (9th Cir.1988) ("It would be ironic if the very acts of benefit payment and plan termination that allegedly resulted in a fiduciary personally obtaining ill-gotten profits should also serve to deny plan beneficiaries standing ... to redress the fiduciaries' alleged breach of the duty of loyalty.").[14]

Therefore, recognizing that we are anchored at one end by *Yancy*, we also believe that *Yancy* does not extend so far as to encompass situations such as the one at issue in *McClendon*. The question then becomes where on that axis the present case falls. A few pertinent distinctions between the two cases bear emphasis. Yancy's position as a retired employee who had received lump sum benefits was largely of his own making. He was informed of the plan amendment and of the effects of each option open to him. Our holding in the case amounts to a decision that he could not both accept the offered inducement for early retirement and then later complain of the choice to which he had been put; if he felt that he was entitled to continue to work and then retire at the time

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[14] We do not mean to imply that an employee's entitlement to certain *remedies* might not turn on whether or not he was willing to return to work. If, for example, he claimed entitlement to the fully vested pension as damages, it might be perfectly reasonable to require that he return to work at least for the additional length of time required for the pension to vest. However, a wrongful discharge might give rise to other damages as well, for which reinstatement would not seem to be a logical prerequisite.

of his choice with a lump sum calculated at the old rate, he was obligated to act consistently with his desired relief by remaining a covered employee and challenging the plan amendment. The violation he alleged — an amendment of the retirement plan that amounted to a breach of fiduciary duty under ERISA § 409, 29 U.S.C. § 1109 — was not one that in and of itself divested aggrieved parties of their status as covered employees able to sue. *McClendon*, on the other hand, had no such choice. A discharge to prevent vesting of benefits in violation of section 510 by definition must be challenged by someone other than a current employee or someone with a claim to vested benefits. Thus, the standing question and the merits of an employee's claim are unavoidably intertwined to some degree; whether a plaintiff has standing to assert ERISA rights may depend upon whether he can establish a discharge or some other conduct in violation of ERISA, but for which he would have standing. *See Amalgamated Clothing*, 861 F.2d at 1410.

The Third Circuit alluded to this problem in its recent *Berger* decision. There, Edgewater Steel amended its retirement plan to eliminate two benefits: a lump sum payment in place of the first three months of pension benefits, and a supplemental payment given as an early retirement benefit to employees whose retirement was in the mutual interests of the company and the retiree and was approved by the company. Upon announcement of these changes, Berger and the other plaintiffs chose to retire before the amendments became effective. They each received the three-month lump sum provided automatically to all retirees, but none were approved for the supplemental payment. Among the plaintiffs' allegations were a charge that the elimination of the three-month lump sum amounted to the elimination of an accrued benefit in violation of ERISA § 204(g), 29 U.S.C. § 1054(g), and a charge that the amendment constituted an intentional interference with their right to both benefits, in violation of ERISA § 510, 29 U.S.C. § 1140. The court, citing *Kuntz* and *Yancy*, held that the plaintiffs did not have standing to assert their section 204(g) claim because they had retired and accepted the benefits in a lump sum, and had not asked for reinstatement. *Berger*, 911 F.2d at 921-22. However, the court noted the contingency of this conclusion on the denial of the plaintiffs' section 510 claim. *Id.* at 922. It stated:

"Of course, we recognize that if the Employees were constructively discharged as they do claim, they would not necessarily have to return to work in order to have standing to claim a make whole remedy." *Id.*[15]

On the record before us, we cannot say where on the spectrum between *Yancy* and *McClendon* this case falls. Because appellants pleaded their ERISA claims only as contingent on preemption of their state law claims, and because the district court did not rule on the merits of the ERISA claims, appellants have not fleshed out their ERISA claims and theories, or even identified with precision which sections of ERISA they claim were violated. However, their allegations do at least suggest an assertion that they were constructively discharged in violation of section 510 and that but for Mobil's nondisclosure they would be covered employees with standing to challenge the plan amendment. They allege deceptive conduct by Mobil that might be found to vitiate the voluntariness of their decision to retire and that might distinguish the present case

---

[15] A Third Circuit decision in a pre-*Firestone* case provides an even more direct illustration of the contingency of standing on the nature of the ERISA violation alleged. In *Saporito v. Combustion Engineering Inc.*, 843 F.2d 666 (3d Cir.1988), *vacated*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989), the plaintiffs claimed that they had been induced to retire under one retirement plan while the employer concealed the development of a second plan with more favorable terms. The court held that they did not have standing as participants in the first plan to sue for breach of fiduciary duties because they had retired and received all of the benefits to which they were entitled in a lump sum. *Id.* at 671. However, the court did hold that they had standing as participants in the *second* plan to argue that they had been tricked into retiring in violation of section 510, because they alleged that "but for the selective divulgence of information, they would have been members of [the second plan], and, for the purposes of standing to bring an action under ERISA, should be considered as such." *Id.* at 672; *see also id.* at 672 n.7 (distinguishing *Stanton v. Gulf Oil Corp.*, 792 F.2d 432 (4th Cir.1986), in which the plaintiff urged "but for" participant standing, but his claim was rejected because the events precluding standing were under his control). *Saporito* was vacated and remanded by the Supreme Court for further consideration in light of *Firestone*, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989).

from both *Yancy* and *Mitchell*. Appellants also sought reinstatement in their ADEA action, and did not affirmatively indicate that reinstatement was not sought under their ERISA claims. For these reasons, we cannot now foreclose the possibility that they could prove facts that would create standing for them, and we believe that the trial court's dismissal on the pleadings of the ERISA claims was premature. Of course, appellants can, and doubtless should, be required to plead their ERISA claims with greater specificity.

We emphasize that we have not determined that appellants will be able to establish a violation of section 510, only that they should be allowed to attempt to do so. We reverse the trial court's dismissal of appellants' ERISA claims and remand for further proceedings consistent with this opinion.

Conclusion

For the reasons stated above, we affirm the district court's grant of summary judgment to Mobil on the ADEA claims and its grant of judgment on the pleadings for Mobil on all of appellants' state law claims. However, we reverse and remand the district court's dismissal of appellants' ERISA claims.

AFFIRMED In Part; REVERSED And REMANDED In Part.

Listing Pursuant to Sup. Ct. R. 29.1 of Mobil Oil Corporation's Parent and of All Non-Wholly-Owned Subsidiaries of Which Mobil Oil Corporation Owns at Least 5% (as of January 8, 1994)

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No. 93-1082

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN A. MORRISON, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1082

JOHN A. MORRISON, *et al.*,
Petitioners,

v.

MOBIL OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONERS' REPLY BRIEF

ARGUMENT

Respondent, Mobil Oil Corporation (Mobil), directs the Court's attention to the Tenth Circuit's decision in *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528 (1993) (*Raymond I*), for a factual description of Mobil's conduct in amending its pension plan in 1984. *Brief in Opposition* at 3 n.4. Petitioners join in this suggestion. In *Raymond I*, the Tenth Circuit agreed with the Fifth Circuit that Mobil " 'did not notify its employees of the waiver provision until well after expiration of the six-month window.' " 983 F.2d at 1530, quoting *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1213 (1992). In fact, when Mobil finally did announce the waiver provision in October 1985, even then it did not reveal that the waiver was in effect *before* the six-month window closed in December 1984. Petitioners "retired" on January 1, 1985, never knowing of their right to apply for the

waiver of the higher lump sum eligibility test nor that the Retirement Equity Act of 1984 (REA) had grandfathered their right to the lump sum benefit under the original eligibility test. *See Raymond I*, 983 F.2d at 1531-32 n.6.

Mobil's argument that "limitations periods begin to run at the time the adverse employment decision 'was made and *communicated*' to employees" is telling. *Brief in Opp.* at 6 (italics added) (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980)). In this case, the adverse employment decisions by Mobil were the willful *concealments* of the existence of the waiver provision and of the timing of its adoption. By definition, fraudulently concealed information is uncommunicated information. The discriminatory act alleged here was never communicated to the employees; rather, it was discovered by them, thus implicating the federal discovery rule.

Mobil argues that "every constructive discharge claim includes elements of nondisclosure." *Brief in Opp.* at 10. Of course, an employer will always attempt to conceal discriminatory *animus*. Petitioners do not argue that nondisclosure of discriminatory *animus* should toll the limitations period. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). The concealment and misrepresentation of the factual and legal status of an employee's rights, however, is a different matter. "To the extent that such efforts succeed, they postpone the [limitations period] by preventing the plaintiff from discovering that he is a victim of a fraud." *Id.* An older employee who is a victim of fraud is not constructively wronged. Logically, an older employee can prove either that he felt compelled to retire or that he was deceived into retiring, not both.

Because this is an action for fraud, Mobil's analysis of the law of equitable tolling is misconceived. As even the Tenth Circuit itself has recently recognized, in "fraud actions, federal equitable tolling principles provide that

'where a plaintiff has been injured by fraud . . . the bar of the statute [of limitations] does not begin to run until the fraud is discovered.' " *Shields v. Boettcher Inv. Corp.*, 1993 WL 482902, at *2 (10th Cir. 1993) (quoting *Holmberg v. Armbrecht*, 327 U.S. 392 (1946)).[1] To avail themselves "of this exception to the period of limitations," petitioners "must show that [they] were 'without fault or want of diligence' in discovering the fraud." *Id.* *See also Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 (10th Cir. 1980) ("[T]he limitations period begins to run when the aggrieved party discovers, or should have discovered by the exercise of reasonable diligence, the facts constituting the fraud") (citing *Holmberg*).[2]

Under *Holmberg* and the federal discovery rule, it is the diligent discovery of *the fraud* which begins the period of limitations, even when the discovery is made after the occurrence of other adverse conduct which creates a subjective feeling of injury. Fraudulent injury is always wrongful, whereas not all "injury is due to wrongdoing." *Cada*, 920 F.2d at 451. In the present case, the Tenth Circuit ignored this principle. This Court should decide whether, under the tolling and accrual principles, a fraud which is the efficient cause of injury and which makes the injury wrongful may go uncontested merely because it was

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[1] *Shields* is unpublished. The Tenth Circuit, however, permits citation of unpublished opinions if they have persuasive value on a material issue. General Order of November 29, 1993, U.S. Order 93-44 (suspending 10th Cir. Rule 36.3 which prohibited citation of unpublished opinions).

[2] Mobil cites *Heideman v. PFL, Inc.*, 904 F.2d 1262 (8th Cir. 1990), and other cases, for the proposition that "attempts to conceal are irrelevant for limitations purposes." *Brief in Opp.* at 7. However, in *Heideman* the plaintiff "knew 'the facts constituting the fraud' when he was discharged." 904 F.2d at 1268 n.5. In any event, are successful concealments irrelevant under *Holmberg*? *See also Irwin v. Veterans Admin.*, 498 U.S. 89, 96 (1990) (noting that tolling principles apply where the plaintiff has been "tricked" by the defendant's misconduct).

successfully concealed for four years—longer than the limitations period applicable to ordinary ADEA claims.[3]

The issue presented to this Court is whether federal courts, assuming diligence by the plaintiff and absent a statute of repose, should carve out of the federal discovery rule a safe harbor for fraud?

Mobil asserts that "many petitioners acknowledged under oath that they believed in 1984 that the [Hobson's choice] was age discriminatory." *Brief in Opp.* at 7 n.7. This is not true. The petitioners did believe that the Hobson's choice was unfair, but all believed, because of the *apparent* approval by the IRS of the pension plan amendments which created the Hobson's choice, that the pension plan changes communicated to them were legal and proper under ERISA. When an employer willfully misrepresents to its employees and plan participants that otherwise adverse pension plan changes have been formally approved by the IRS, such active deception by the employer not surprisingly will lead the employees to believe that they were not legally wronged. *See Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3rd Cir. 1993). Mobil's citation to *United States v. Kubrick*, 444 U.S. 111 (1979), therefore, is inapposite. *Brief in Opp.* at 10. *Kubrick* was not a fraud case.

Mobil conspicuously fails to defend the Tenth Circuit's unreasoned holding that the difference between a claim for constructive discharge and a claim for fraudulent discharge is "merely an 'exercise in semantics.'" *Brief in Opp.* at 8-9. How can the two claims be legally the same

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[3] The alleged fraud was the efficient cause of petitioners' injuries: Mobil affirmatively misrepresented to the petitioners that the IRS had approved the pension plan amendments which created the Hobson's choice when, in fact, the IRS had approved plan amendments which included a waiver provision obviating the Hobson's choice. The announced changes in the pension plan could not have been the proximate, *legal* cause of petitioners' injury.

if—on their merits—they can result in different outcomes? A claim for constructive injury could fail because the allegedly adverse employment decisions actually communicated to the employees were shown to be business justified, yet a claim for fraudulent injury could succeed because no alleged adverse concealments and misrepresentations can ever be business justified. *See and compare, Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 471-73 (10th Cir. 1990), *cert. denied*, 498 U.S. 898 (1990).

This is why petitioners candidly argue that federal courts should recognize a claim for fraudulent discharge for employees who are victims of fraud. If the petitioners prove, as they must, that the alleged fraud was age-discriminatory, the jury may find that Mobil deceived older employees into early retirement. That some petitioners also may have felt that it was in their best interests to retire in the face of Mobil's partial communications to them concerning their pension rights is immaterial.

Finally, Mobil's assertions that the petitioners failed to comply with the requirement that EEOC charges be timely filed is simply wrong. Upon discovery in late 1988 of the concealments of the IRS-mandated waiver provision, class representatives timely filed, in early 1989, class-wide EEOC charges alleging fraudulent discharge. Subsequently, the EEOC dismissed the charges, not as untimely, but because this fraud action was proceeding in the district court. The EEOC limitations will not bar a trial on the merits.

CONCLUSION

The petitioners respectfully request that their petition for writ of certiorari be GRANTED.

Respectfully submitted,

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February 10, 1994